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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1032

PRESTON DIAL and BILLY H. CUNNINGHAM,
Appellants,

vs.

RICHARD FONTAINE,
Appellee.

On a Direct Appeal from the United States Three Judge
District Court for the Western District of Texas

MOTION TO AFFIRM

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RICHARD FONTAINE,
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On a Direct Appeal from the United States Three Judge District Court for the Western District of Texas

MOTION TO AFFIRM

Pursuant to Paragraph 1(e) of Rule 16 of the Revised Rules of this Court, Appellee moves that the judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

The Appellee suggests that a better and more specific statement of the substance of the questions presented by this action is as follows:

1. Is the ex parte issuance of a search warrant and subsequent seizure of a motion picture film from a commercial motion picture theatre upon the affidavit and testimony of an Assistant District Attorney describing the movie which the magistrate himself did not view, such a procedure which will adequately assure non-obscene material the constitutional protection to which it is entitled.

2. Is an adversary hearing required before the seizure with or without a search warrant of a motion picture film playing in a public motion picture theatre.

3. Will the offer of an adversary hearing after seizure adequately insure non-obscene material the constitutional protection to which it is entitled, particularly, when the statute relied upon does not provide a time for the hearing to be set and does not provide for a prompt judicial decision.

STATEMENT

This is an appeal from the judgment of the United States Three Judge District Court from the Western District of Texas holding that a prior adversary hearing was necessary before the issuance of search warrants for the seizure of motion picture films. The Court held the seizing of the motion picture films after merely an ex parte proceeding was constitutionally deficient and ordered the films to be returned and enjoined the utilization of Section 6, Article 527 Texas Penal Code unless a prior adversary hearing was afforded the party against whom any writs and processes including search warrants was sought.

Appellee was the manager of the Joy Theatre in San Antonio, Bexar County, Texas. The theatre, engaged in the public commercial exhibition and display of motion pictures, limited its admissions to those over the age of eighteen (18) years. The appellants seized films from the theatre by virtue of search warrants on three (3) occasions, and in each instance appeared before a judge with an affidavit and testimony of the events portrayed in the motion picture whereupon the judge issued the search warrant for the particular motion pictures described to him. The only judicial proceeding on the issue of obscenity before the seizure was the ex parte hearing before the various judges and no record of the testimony at the ex parte hearing was available. No adversary hearing was requested or held prior to the seizure. Subsequent to the first seizure on May 6, 1969, a hearing was set to determine the obscenity of the films, photographs and posters for 11:00 A. M. on May 9, 1969, and a motion was filed on behalf of the theatre requesting a postponement until non-resident counsel for the theatre could be fully informed (Appendix Exhibit A). The hearing was postponed until May 16 at which time another motion was

filed by the theatre requesting an indefinite postponement pending the outcome of this action filed in the United States District Court, and an order was entered (Appendix Exhibits B and C). Subsequently, on May 26, when the second search warrant and seizure was made, and a hearing set for May 28, an additional motion was filed by the Appellee, and an order was signed postponing the matter pending the outcome of Cause No. SA-69-CA-26, styled Richard Fontaine v. Preston Dial and Billy H. Cunningham in the United States District Court for the Western District of Texas (Appendix Exhibits D and E). Similarly, upon the seizure of June 5, a like postponement was made pending the outcome of the cause in the United States District Court. The Appellee, Mr. Fontaine, was not arrested on May 6 or June 5, 1969, as a result of the issuance of the search and arrest warrants, but was arrested and charged on May 26, 1969, with a violation of Article 527 of the Penal Code of Texas, namely, the Texas Obscenity Statute.

The pre-trial procedures in the United States District Court narrowed the issues and the Court considered only the single issue of whether or not an adversary hearing must be held before motion pictures may be seized by search warrant from a commercial motion picture such as the Joy Theatre in San Antonio.

ARGUMENT

The questions presented are clearly foreclosed by the prior decisions of this Court and have been followed by lower Federal courts.

The most recent decision involving an almost identical situation is **Tyrone, Inc. v. Wilkinson**, 410 F. 2d 639 (4th Cir. 1969), petition for certiorari pending, No. [illegible], 38 U.S.L.W. 3178, November 11, 1969. The magistrate who issued the search warrant viewed the film and also reviewed affidavits of three police officers and two lawyers. The sole claim of the theater, upheld by the Court, was that the Constitution required an adversary hearing to determine obscenity before the film could be seized. The reasons for an adversary hearing before seizure apply as strongly to motion picture films as to books. The hearing is not designed to facilitate the display of obscene material but to focus searchingly on the question of obscenity and protect the expression of ideas through movies. The Fourth Circuit Court of Appeals found support in the decision of **Metzger v. Pearcy**, 393 F. 2d 202 (7th Circuit 1968). Both the Fourth Circuit and the Seventh Circuit relied upon the decision of this Court in **Quantity of Books v. Kansas**, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964).

Quantity of Books v. Kansas, *supra*, involved an ex parte hearing, and this Court held the warrant for the seizure of the books and authorizing their suppression pending hearing was constitutionally insufficient because it did not adequately safeguard against the suppression of non-obscene books. The clear holding of the Court is that since the book distributor was not afforded a hearing on the question of obscenity before the warrant was issued, the procedure was constitutionally deficient. A seizure which precedes an adversary determination of the ob-

security of the material is not allowed. There is a danger of abridgement of the rights of the public in a free society to the unobstructed circulation of non-obscene material. The principle requiring notice and the opportunity to be heard before suppression or seizure has likewise been approved by this Court in **Carroll v. President and Commissioners of Princess Anne**, __ U. S. __, 89 S. Ct. 347. A restraining order was issued without notice restraining Carroll and others from holding rallies and meetings in the county. This Court properly found there was no place within the area of basic freedoms guaranteed by the First Amendment for such temporary restraining orders where no showing was made that it was impossible to serve or notify the opposing parties and to give them an opportunity to participate. In the opinion the Court cites **Quantity of Books v. Kansas**, supra, which condemned a statute for not first affording the seller of the books an adversary hearing. The Court in a footnote refers to **Kingsley Books, Inc. v. Brown**, 354 U. S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469, and indicates that the New York courts have subsequently held that no ex parte injunction may be issued under the New York statute authorizing injunctions against the distribution of obscene books.

This Court in **Marcus v. Search Warrant**, 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 explicitly said that **Kingsley Books**, supra, does not support the proposition that the State may impose the extensive restraints imposed there on the distribution of publications prior to an adversary hearing on the issue of obscenity, irrespective of whether or not the material is legally obscene.

In **Lee Art Theatre, Inc. v. Virginia**, 392 U. S. 636, 88 S. Ct. 2103, the Court in per curiam opinion held that the seizure of a motion picture under the authority of a warrant issued by a Justice of the Peace on the basis of

an affidavit of a police officer was an unconstitutional seizure.

The Court in **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734 was considering a motion picture censorship statute. One of the principles enumerated was that the teaching of the cases is that because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression. The opinion points out that **Kingsley Books, Inc. v. Brown**, supra, postpones any restraint against sale of books until a judicial determination of obscenity following notice and an adversary hearing. The statute likewise provides for a prompt judicial decision.

It is manifest not only from the decisions of this Court but from decisions of lower Federal Courts that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument. The decisions hereafter cited clearly require that notice and an opportunity to be afforded an adversary hearing is required before permitting seizure of a motion picture film from a theatre open to the general public.

Besides the Fourth Circuit holding in **Tyrone, Inc. v. Wilkinson**, 410 F. 2d 639, the following Circuit Court of Appeals opinions have held a prior adversary hearing was necessary. **Metzger v. Pearcy**, 393 F. 2d 202 (7th Cir. 1968) and **Bethview Amusement Corporation v. Cahn**, 416 F. 2d 416 (2nd Circuit, Oct. 6, 1969).

The following three judge district courts have held that a prior adversary hearing was necessary before seizure or suppression of motion pictures or books. **Gundlach v. Rauhauser**, 304 F. Supp. 962 (Middle District of Pa., Oct. 21, 1969); **Delta Books Distributors, Inc., et al. v. Cronvich**, No. 68 1927, ... F. Supp. ... (Eastern Dis-

trict of Louisiana, 1969); **Carter v. Gautier, et al.**, No. 2422 ... F. Supp. ... (Middle District of Georgia, 1969); **Cambist Films, Inc. v. Tribell**, 293 F. Supp. 407 (Eastern District of Kentucky, 1968); **Entertainment Ventures, Inc., et al. v. Albert T. Brewer, Governor of Alabama**, No. 2898 N ... F. Supp. ... (Middle District of Alabama, 1969); **George Gable d.b a Book Sales Company v. Jenkins**, No. 12001, ... F. Supp. ... (Northern District of Georgia, October 24, 1969).

The following United States District Court decisions required a prior adversary hearing. **U. S. v. Brown**, 274 F. Supp. 561 (Southern District New York, 1967); **Poulos v. Rucker**, 288 F. Supp. 305 (Middle District Alabama, 1968); **Sokolic v. Ryan**, 304 F. Supp. 213 (Southern District Georgia 1969); **Cambist Films, Inc. v. State of Illinois**, 293 F. Supp. 185 (Northern District Illinois, 1968); **Wilhelm v. Turner**, 298 F. Supp. 1335 (Southern District Iowa, 1969); **Central Agency, Inc. v. Brown, et al.**, No. 13023 ... F. Supp. ... (Northern District Georgia, 1969); and **Sayles v. Graham**, No. 69-81 ... F. Supp. ... (Arizona 1969).

The appellants attempted to distinguish **Quantity of Books v. Kansas**, supra, by saying the seizure of one motion picture is different from the mass seizure of books. This is answered by **Bethview v. Cahn**, supra, which holds that a large number in a community could be prevented from having access to a film is no different from preventing a similar large number of books from being circulated.

Appellants further emphasize that the Assistant District Attorney described the motion picture in detail and did not have conclusory assertions. This in itself is a conclusion since no record was made of the ex parte proceedings. In addition, this Court has pointed out in

Carroll v. President and Commissioners of Princess Anne, supra, that there is a danger in relying exclusively on the version of events and dangers presented by prosecuting officials, because of their special interest, 89 S. Ct. at 353.

The decision in **Quantity of Books v. Kansas**, supra, is not one of an evenly divided court which under the rule in **U. S. v. Pink**, 315 U. S. 203, would only apply to the particular case at issue. The decision was by four members of the court, but two other members concurred because they felt all books had First Amendment protection and one concurred because the books were not hardcore pornography. Only two members of the court dissented. Certainly, the Court has appeared to foreclose the decision of the necessity for a prior adversary hearing in commercial motion picture theatres by the denial of certiorari in **Tyrone v. Wilkinson**, supra.

It is inappropriate to discuss prior restraint or censorship proceedings in a proceeding involving either the criminal or civil seizure of books. The censorship statutes presuppose a burden upon the distributor of the book or motion picture to submit it to the censors, and the decisions of this court seem to require that the Board either grant the license for distribution or go to Court. The Court further requires a prompt judicial decision. The statutes of the State of Texas cited by the appellants certainly do not require a prompt judicial decision. In fact, the facts in this action clearly show that the appellee was not arrested on the first seizure and taken before a magistrate where he could question the seizure of the film.

The decision relied upon by the appellants of **Rage Books v. Leary**, 301 F. Supp. 574 (Southern District New York, Aug. 1969) would appear to be overruled by the

later decision of the Second Circuit in **Bethview Amusement Corporation v. Cahn**, 416 F. 2d 410. Likewise, the decision in **Cinema v. Vergari** (S. D. N. Y. Aug. 1969) would appear to have been overruled.

It is not appropriate to compare a "stag party" at which movies are shown to a public motion picture theatre regularly advertising and showing films. The one night surreptitious screening of a film at a lock door stag party is completely different from the commercial distribution of motion picture films and their showing in public theatres.

We disagree with appellants in their characterization of **Pennsylvania v. Guild Theatre**, 248 A. 2d 45 (1968). The Court held both the ex parte preliminary injunction and no provision in the statute for final judicial determination required the injunction to be vacated. The offer of a hearing within four (4) days of the original restraint did not provide procedural safeguards to obviate the danger of a censorship system.

This Court has held the requirement for a prompt judicial decision to be required in any censorship ordinance in **Teitel Film Corporation, et al. v. Cusack**, 390 U. S. 139, 88 S. Ct. 754.

Restraint of a short duration is a matter of importance and consequence in view of the First Amendment. The denial of a basic procedural right of notice and the opportunity to participate in an adversary hearing "is not excused by the availability of post-issuance procedure" which at best could only shorten the period of restraint. **Carroll v. President and Commissioners of Princess Anne**, supra.

CONCLUSION

For the foregoing reasons, we respectfully submit that the questions presented by appellants are clearly insubstantial and that the judgment of the District Court should be affirmed.

LONGSTREET HEISKELL

FRIERSON M. GRAVES, JR.

FREDERICK SHANNON, JR.
Attorneys for Appellee

Certificate of Service

I, Longstreet Heiskell, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Motion to Affirm has been served on counsel for the appellee by depositing same in the United States Mail, Air Mail, postage prepaid, addressed to Crawford C. Martin, Attorney General of Texas Supreme Court Building, Austin, Texas and Preston H. Dial, Jr., First Assistant Criminal District Attorney, Bexar County Courthouse, San Antonio, Texas 78204.

Dated this 29th day of January, 1970.

Longstreet Heiskell

APPENDIX

EXHIBIT A

In the District Court
57th Judicial District
Bexar County, Texas

In the matter of the Joy Theatre } No. F-....

MOTION

To the Honorable Judge of Said Court:

Now comes Southland Theatres, Inc., a corporation, duly operating the Joy Theatre, 221 West Houston Street, San Antonio, Bexar County, Texas, and respectfully moves the Court as follows:

I

That certain films, photographs and posters were removed from the premises of said Joy Theatre by the District Attorney of Bexar County, Texas, on May 6, 1969, under search warrant of same date on allegations that same were obscene and possessed in violation of Penal Code, Article 527.

II

That a hearing to determine the obscenity of said films, photographs and posters has been set for 11:00 a. m. on May 9, 1969, in the 57th District Court, Bexar County, Texas.

III

That said hearing should be postponed until non-resident counsel for said Joy Theatre can be fully informed concerning this matter.

IV

That this Motion is not a waiver of Movant's right to a speedy determination of obscenity, but on the other hand is made solely for the purpose of allowing counsel for Movant to prepare himself for such hearing.

Wherefore, Premises Considered, Movant prays that the hearing to determine obscenity, above described, be postponed for a reasonable time in order to allow non-resident counsel for Movant to fully prepare himself for same.

/s/ Frederick Shannon, Jr.
Frederick Shannon, Jr.
Attorney for Movant

Lang, Cross, Ladon, Oppenheimer & Rosenberg
1540 Milam Building
San Antonio, Texas 78205
Of Counsel

EXHIBIT B

In the District Court
57th Judicial District
Bexar County, Texas

In the Matter of the Joy Theatre } No. F-....

MOTION

To the Honorable Judge of Said Court:

Now comes Southland Theatres, Inc., a corporation, duly operating the Joy Theatre, 221 West Houston Street, San Antonio, Bexar County, Texas, and respectfully moves the Court as follows:

I

That certain films, photographs and posters were removed from the premises of said Joy Theatre by the District Attorney of Bexar County, Texas, on May 6, 1969, under search warrant of same date on allegations that same were obscene and possessed in violation of Penal Code, Article 527.

II

That a hearing to determine the obscenity of said films, photographs and posters has been set for 11:00 a. m. on May 16, 1969, in the 57th District Court, Bexar County, Texas.

III

That said hearing should be postponed indefinitely pending the outcome of cause No. ...., Richard Fontaine v. Preston Dial and Billy H. Cunningham, in the United

States District Court for the Western District of Texas, which may render moot the question of whether the articles seized were obscene.

IV

That this Motion is not a waiver of Movant's right to a speedy determination of obscenity, but on the other hand is made solely for the purpose of allowing Movant to assert and litigate the illegality of the seizure of said articles in the proper forum;

Wherefore, Premises Considered, Movant prays that the hearing to determine obscenity, above described, be postponed until the above described cause is finally adjudicated.

Frederick Shannon, Jr.
Attorney for Movant

Lang, Cross, Ladon, Oppenheimer & Rosenberg
1540 Milam Building
San Antonio, Texas 78205
Of Counsel

EXHIBIT C

In the District Court, 57th Judicial District,
Bexar County, Texas

In the Matter of
The Joy Theatre } No. F-.....

ORDER

On this the 21 day of May, 1969, came on to be heard Southland Theatre, Inc.'s Motion to postpone hearing heretofore entered herein, and the Court having read the pleadings is of the opinion that the hearing in this cause set for 11:00 a. m. May 16, 1969, in the 57th District Court, is hereby postponed until such further time as the outcome of cause No. ....., Richard Fontaine v. Preston Dial and Billy Cunningham, in the United States District Court for the Western District of Texas, is determined.

Signed and entered this the 21 day of May, 1969.

/s/ Franklin Spear
Judge Presiding

Approved as to Form:

/s/ Frederick Shannon, Jr.
Attorney for Southland Theatre, Inc.

/s/ Preston Dial
Assistant District Attorney

EXHIBIT D

In the County Court at Law, Number Two,
Bexar County, Texas

In the Matter of
The Joy Theatre } No. 174454

MOTION

To the Honorable Judge of Said Court:

Now comes Southland Theatres, Inc., a corporation, duly operating the Joy Theatre, 221 West Houston Street, San Antonio, Bexar County, Texas, and respectfully moves the Court as follows:

I

That certain films, photographs and posters were removed from the premises of said Joy Theatre by the District Attorney of Bexar County, Texas, on May 26, 1969, under search warrant of same date on allegations that same were obscene and possessed in violation of Penal Code, Article 527.

II

That a hearing to determine the obscenity of said films, photographs and posters has been set for 10:00 a. m., on May 28, 1969, in the County Court Number Two, Bexar County, Texas.

III

That said hearing should be postponed indefinitely pending the outcome of cause No. SA69CA136, styled Richard Fontaine v. Preston Dial and Billy H. Cunningham, in the United States District Court for the Western District of Texas, which may render moot the question of whether the articles seized were obscene.

IV.

That this Motion is not a waiver of Movant's right to a speedy determination of obscenity, but on the other hand is made solely for the purpose of allowing Movant to assert and litigate the illegality of the seizure of said articles in the proper forum.

Wherefore, Premises Considered, Movant prays that the hearing to determine obscenity, above described, be postponed until the above described cause is finally adjudicated.

/s/ Frederick Shannon, Jr.
Attorney for Movant

Lang, Cross, Ladon, Oppenheimer &
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San Antonio, Texas 78205
Of Counsel

EXHIBIT E

In the County Court at Law, Number Two,
Bexar County, Texas

In the Matter of
The Joy Theatre } No. 174,454

ORDER

On this, the 28 day of May, 1969, came on to be heard Southland Theatre, Inc.'s Motion to postpone hearing heretofore entered herein, and the Court having read the pleadings is of the opinion that the hearing in this cause set for 10:00 a. m., May 28, 1969, in the County Court Number Two, is hereby postponed until such further time as the outcome of cause No. SA69CA136, styled Richard Fontaine v. Preston Dial and Billy H. Cunningham, in the United States District Court for the Western District of Texas, is determined.

Signed and Entered this the 28 day of May, 1969.

/s/ Garcia
Judge Presiding

Approved as to Form:

/s/ Frederick Shannon, Jr.
Attorney for Southland Theatre, Inc.

/s/ Preston Dial
Assistant District Attorney